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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Printed in Austria

Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 1976: CISG 1(1)(a); 11; 12; 18(3)
Brazil: Appellate Court of the State of São Paulo, 32nd Private Law Chamber
Appeal No. 1017219-07.2017.8.26.0004
Società Agricola Beoletto Aurelio & Mario v. Agropel Agroindustrial Perazzoli Ltda.
9 December 2021
Original in Portuguese
Available at: http://www.tjsp.jus.br

Abstract prepared by Naíma Perrella Milani

In 2017, an Italian company Società Agricola Beoletto Aurelio & Mario (the seller) filed a suit against a Brazilian company Agropel Agroindustrial Perazzoli Ltda. (the buyer), claiming that, in 2013, it had sold 5,040 boxes of kiwi Hayward which had not been paid by the buyer. The buyer argued that it had never bought the goods and that the seller had no written proof of the two alleged sales transactions. A lower court judge ruled in favour of the buyer. Subsequently, the seller appealed to the Appellate Court of the State of São Paulo.

The seller admitted that it no longer had the backup files that proved the existence of the transactions but contended that a contract of sale does not need to be concluded in or evidenced by writing, as per article 11 CISG. According to the seller, the Convention would apply by analogy, since the parties had entered into the sales agreement on 1 July 2014 and the CISG only came into force in Brazil on 16 October 2014.

The Court ruled that reasoning by analogy would be inadequate in this case, since the Brazilian legal framework was sufficient to solve the dispute and therefore analogy was unnecessary. Nevertheless, it acknowledged that the CISG should be applied as soft law, due to the fact that it is an expression of the most widespread practice of the international sale of goods, as decided in *Anexo Comercial v. Noridane Foods*,[1] another Brazilian precedent that applied the CISG to a dispute that happened before the CISG entered into force in the country.

The Court also stated that both Italy and Brazil are Contracting States of the CISG, as per article 1(1)(a), and neither had lodged a declaration requiring contracts of sale to be concluded in or evidenced by writing, as allowed by article 12 CISG.

Furthermore, according to the ruling, documents issued by the Brazilian Foreign Trade Integrated System (SISCOMEX) proved that the goods had been delivered to the buyer at the port of destination. The fact that they had not been rejected by the buyer was sufficient evidence that the buyer agreed to the sale, in consonance with article 18(3) CISG.

In addition, when requested by the seller to pay for the goods, the buyer simply remained silent, instead of challenging the existence of the contract. The Court found that the proof of delivery of the goods combined with the behaviour of the parties led to the conclusion that the buyer had ordered and received the kiwis and failed to pay.

Therefore, the contract was found to be existent and valid in accordance with article 11 CISG. The decision cites the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition) and many similar precedents regarding the interpretation of article 11 CISG.

[1] *Anexo Comercial Importação e Distribuição Ltda. – EPP. v. Noridane Foods S.A.*, Appellate Court of the State of Rio Grande do Sul, 14 February 2017; reported in CLOUT case No. 1733.

Case 1977: CISG 1(1)(b); 74
Poland: District Court of Szczecin
VIII GC 262/16
A. (Pakistani buyer) vs. B. sp. z o.o. sp. k. (Polish seller)
4 October 2017
Original in Polish
Published: www.orzeczenia.ms.gov.pl, Legalis No. 2190512
Available at: CISG-online database (www.cisg-online.org), case No. 5300

Abstract prepared by Maciej Zachariasiewicz, National Correspondent and Aleksandra Pilipiuk

A Polish seller (B) sold steel scrap (used compressors) to a buyer established in Pakistan (A). For the shipment to Pakistan, the goods had been loaded in two containers in the port H in Germany. During the customs inspection, a prohibited substance called fluorocarbon was found in one of the two containers. As a result, the carrier was prohibited from exporting the contaminated container which had to remain at the German customs authorities in port H, incurring port fees for the buyer. The container was then brought to a company in Poland that was authorized to collect hazardous waste.

The buyer brought an action before the District Court against the seller claiming that the latter did not inform that the goods could potentially be contaminated with prohibited substances. The buyer further claimed that the delivery of the contaminated goods constituted improper performance of the contract and incurred high costs due to the long-term storage of the container in the port in H.

The District Court issued a payment order obliging the seller to pay to the buyer the amount of USD 51,985.78 plus the statutory interest. The seller objected to the payment order arguing that it should not be held liable for the damage to the buyer because at the time of the receipt of the goods, all benefits and burdens had been transferred to the buyer, and it was the buyer who decided on their final destination. In the opinion of the seller, the buyer, as a professional trader, had all the technical possibilities and knowledge to check the goods and possibly obtain approval for an international shipment. The seller also argued that a representative of the buyer was present during the loading of the goods and did not raise any objections to their quality.

In its judgment, the District Court (the Court) dismissed the claim of the buyer in its entirety.

The Court first confirmed the applicability of the CISG by virtue of Article 1(1)(b).

As to the merits of the case, the Court then pointed out two grounds for dismissing the claim.

First, the Court found that the buyer did not prove that the goods detained by the customs authorities in H were the same sent to the port H by the seller. The Court reminded that under the general principle of the Polish Civil Code (article 6) the burden of proof as to a given fact rests on the party who draws legal consequences from that fact.

The second ground on which the Court dismissed the claim related to the extent of the damages. The Court explained that the second sentence of article 74 CISG provided for the recognition of a foreseeable loss. The Court observed that in the case at hand the seller did not know that the buyer intended to export the goods outside the European Union. Furthermore, in the parties' earlier exchanges regarding the goods, no information was ever given by the buyer as to the final destination of the goods. Thus, the seller did not know about the supplementary restrictions as to the quality and that the goods' contamination with fluorocarbon would be an obstacle to their export. Consequently, the seller could not have foreseen that additional costs might be incurred to the buyer.

Case 1978: CISG 9; 53; 55
Poland: Court of Appeal of Warsaw
VII AGa 1093/18
V. (Romanian seller) vs. B. sp. z o.o. (Polish buyer)
16 April 2019
Original in Polish
Published : www.orzeczenia.ms.gov.pl, Legalis No. 2126685
Available at: CISG-online database (www.cisg-online.org), case No. 5298

Abstract prepared by Maciej Zachariasiewicz, National Correspondent and Aleksandra Pilipiuk

In 2008, an agreement was concluded between a Romanian seller (the plaintiff) and a Polish buyer (the defendant) for the sale of mixing plant equipment at the net price of EUR 524,216.40. The contract was concluded orally following negotiations that did not take into account the VAT amount. The Romanian tax authorities carried out an inspection and considered that the sale was subject to VAT at the rate of 19 per cent and not 0 per cent as envisaged by the parties. Therefore, on 22 October 2008, the plaintiff issued a corrected invoice with the addition of the 19 per cent VAT to the net price, amounting to a gross price of EUR 623,817.52 (with the VAT amounting to EUR 99,601.12).

After its issuance, the invoice was entered into the books by the seller and the VAT was paid. Striving for an amicable settlement, the parties began talks regarding the possibility for the seller to recover the VAT while the buyer would apply for a tax refund that could be then transferred to the seller. By letter of 2 March 2009, the buyer applied to the tax authorities in Romania for a VAT refund invoking the VAT invoice issued by the seller, however, the application turned out to be ineffective.

The seller brought an action before the District Court (first instance) against the buyer for the payment of the VAT amount plus statutory interest, claiming that the latter had paid only the net price and refused to pay the full price.

The District Court considered that pursuant to article 53 CISG, the economic burden of the tax is to be borne by the buyer, while the seller is the taxpayer, and held in favour of the seller.

Referring to article 55 CISG, the District Court concluded that if the price in the sales contract is not clearly indicated, it is considered that the parties referred to the price customary at the time of conclusion of the contract for goods sold in similar circumstances in a given field of trade. Thus, it is a matter of establishing the market price, and the market price is always the net price plus the VAT. It is customary that the buyer bears the economic burden of the VAT.

The buyer appealed alleging violation of articles 53, 55 and 9 CISG. It contended that it was erroneous to assume that it was customary for the buyer to pay the VAT, given that the circumstances of the present case were not typical (change of legal classification of the contract challenging its qualification as an intra-community supply of goods exempted from VAT). According to the buyer, no usage determined in such circumstances which party would bear the risk of reclassifying the contract for tax purposes (or, at least, the court had not made any determination as to the existence of such a usage).

The Court of Appeal (the Court) considered this allegation as unfounded and confirmed the decision of first instance. While it acknowledged that the circumstances of the case were not typical, as contented by the buyer, since the seller first charged a VAT at the 0 per cent rate and then corrected the invoice indicating the 19 per cent rate, the Court considered that this alone did not preclude the usage according to which VAT was an element of the price paid by the buyer. It therefore held that the buyer had to bear the economic burden of the transaction in this regard. The Court noted that this usage was a consequence of the principle of neutrality of VAT for the taxpayer which had been repeatedly recognized as a fundamental right of the taxpayer in the jurisprudence of the Court of Justice of the European Union.

Case 1979: CISG 1(1)(a); 8; 9; 10; 35(1); 35(3); 38; 39; 44
Poland: Court of Appeal of Szczecin
I AGa 123/18
A. sp. z o.o. (Polish seller) vs. B. sp. z o.o. (Lithuanian buyer)
27 November 2018
Original in Polish
Published: www.orzeczenia.ms.gov.pl, Legalis No. 2180712
Available at: CISG-online database (www.cisg-online.org), case No. 5356

Abstract prepared by Maciej Zachariasiewicz, National Correspondent and Aleksandra Pilipiuk

A contract for sale of thermal paper was concluded on 21 November 2014 between A, a company with place of business in Poland (the seller) and B, a company with place of business in Lithuania (the buyer), for an agreed price of EUR 26,445.44.

On 19 November 2013, the buyer paid EUR 16,445.44 on the basis of a proforma VAT invoice. The buyer was to pay the remaining amount within 30 days from the date of sale, which took place, in accordance with the terms of delivery, when the seller made the goods available at its warehouse. By letter of 8 January 2014, the seller requested the buyer to pay the remaining part of the price but the buyer failed to comply. The seller sued the buyer for the recovery of the outstanding balance and statutory interest in front of the District Court of Szczecin.

In front of the District Court, the buyer objected that the paper received was of poor quality, which made it not suitable for the intended use. Due to the defects of the delivered goods, which had been further processed and resold, the buyer alleged to have suffered losses in the total amount of EUR 30,979.90 and asked for compensation or, alternatively, set-off against the claim of the buyer.

By a judgment of 12 December 2017, the District Court in Szczecin awarded to the seller EUR 10,000 plus the statutory interest. The buyer filed appeal at the Court of Appeal in Szczecin.

The Court of Appeal (the Court) confirmed that the CISG applied under its article 1(1)(a) as both parties had place of business in countries parties to the Convention. The Court also found that the seller had provided sufficient evidence that the sales contract had been concluded and the goods had been delivered under the contract.

With respect to the counterclaim of the buyer for compensation of damages arising from non-conformity of the goods, the Court found that, if the buyer had inspected the goods in accordance with article 38 CISG, it could have detected possible defects in the quality of the paper when the paper was delivered before it was further processed and resold. However, the buyer did not notify the seller about the non-compliance within a reasonable time from the moment when the defects could have been discovered. The Court reminded that this, in accordance with article 39 CISG, resulted in the loss of the right to plead non-conformity of the goods.

More precisely, the Court noted that the buyer learned of the non-conformity of the goods on 10 January 2014, when its contracting party complained about the lack of quality of the final product. In the opinion of the Court, the notice of non-conformity sent to the seller on 11 April 2014 (i.e., 3 months after learning of the alleged non-conformity) could not be considered as made within a reasonable time within the meaning of article 39 CISG. The Court also noted that the buyer did not prove any circumstance that would allow to evade the effects of the expiry of the period in accordance with article 44 CISG. As a result, the Court concluded that the buyer had lost the right to rely on the non-compliance of the goods with the contract and, consequently, to claim damages (articles 45 and 74 CISG) or to have the price reduced (article 50 CISG).

Moreover, the Court, taking into account articles 8 and 9 CISG, noted that the contract was for the goods of “defective quality” (“stock lot sale”), which had a lower price.

Furthermore, the Court stressed that given such quality of the goods the seller had made clear with every invoice sent to the buyer that it took no liability for the defects of the goods. Still, the buyer kept on ordering goods from the seller. Thus, the Court concluded that the buyer must be deemed to have known of the exclusion of the liability.

The Court also noted the correspondence between the parties concerning a possibility of deferred payment, in which the seller had agreed to delivery of the goods without "a chance for a complaint [about their quality]", given that the goods were sold "stock lot". Thus, it was clear that the buyer was aware of the meaning of the term "stock lot".

The buyer, in turn, has not produced any evidence, indicating that it did not accept the exclusion of liability. The exclusion of liability thus constituted yet another reason to dismiss the buyer's appeal.

Case 1980: CISG 2(b); 2(c); 4(a); 6
Switzerland: Bundesgericht (Federal Supreme Court)
No. 4A_543/2018
28 May 2019
Original in German
Published: BGE 145 III 383–391; Internationales Handelsrecht (2019), 236–244; Swiss Federal Supreme Court database (www.bger.ch)
Available at: CISG-online database (www.cisg-online.org), case No. 4463

Abstract prepared by Ulrich G. Schroeter, National Correspondent

The buyer is a Swiss State-owned entity incorporated under Swiss public law. In 2003, it conducted a public tender process calling for bids to deliver electricity meters that were to be installed in private households in a canton in Switzerland. The buyer's general conditions of purchase provided for the application of Swiss law. The successful bidder was a Slovene company (seller A) that soon began to deliver electricity meters. Seller A subsequently established a subsidiary in Switzerland (seller B) that was involved in the later deliveries of electricity meters. It remained a point of dispute whether, under the later sales contracts with the buyer, seller B was the only seller, whether seller A and seller B were jointly involved as sellers or whether seller B subsequently became a contracting party by way of a contract modification. Between 2004 and 2009, approximately 35,000 electricity meters were delivered and installed in the homes of the buyer's customers, before it was discovered that all meters suffered from a design defect (so-called "whiskers" problem) resulting in measurement errors.

The buyer initiated court proceedings against seller A and seller B in the Court of First Instance Basel-Stadt, claiming repayment of the entire contract price as well as damages. The sellers, inter alia, pointed out that the buyer had only given notice of non-conformity in 2012, well after the two-year cut-off period of article 39(2) CISG had passed. The Court of First Instance nevertheless granted the buyer's claim, holding that the buyer had a right to rescind the contract in accordance with Swiss domestic law (article 24(1) No. 4 Swiss Code of Obligations) because it had been in error about the electricity meters' quality when concluding the contract.[2] Upon the sellers' appeal, the Court of Appeal Basel-Stadt reversed the judgment in a carefully reasoned decision and dismissed the claim.[3] The buyer appealed to the Swiss Federal Supreme Court.

Affirming the Court of Appeal's decision, the Swiss Federal Supreme Court took the opportunity to clarify a number of interpretative issues under the CISG. In doing so,

[2] Zivilgericht Basel-Stadt, 26 October 2016 – K5.2015.2, CISG-online case No. 3904.

[3] Appellationsgericht des Kantons Basel-Stadt, 24 August 2018 – ZB.2017.20 (AG.2018.557), CISG-online case No. 3906 = Internationales Handelsrecht (2019), 101–116 = Schweizerische Juristen-Zeitung (2019), 158–160. Commented on by Schroeter, Internationales Handelsrecht (2019), 133–136.

the Supreme Court stressed the importance of aiming for an internationally uniform interpretation of the Convention in accordance with article 7(1) CISG. Throughout its decision, the Supreme Court made ample references to foreign CISG case law, citing an overall number of 21 foreign (i.e. non-Swiss) court decisions from 7 different countries (Austria, Belgium, France, Germany, Israel, Italy, United States of America), as well as a CISG Advisory Council Opinion.

With respect to the CISG's applicability, the Swiss Supreme Court clarified that the Convention also applies to multi-party sales contracts involving more than one buyer or/and more than one seller. The CISG's applicability to the entire multi-party sales contract remains unaffected even if only one of two parties on one "side" of the contract (here: the Slovene seller A) has his place of business in a different State than the opposing party (here: the Swiss buyer) as required by article 1(1) CISG, because any other approach would be impractical and result in the splitting-up of a coherent legal transaction.

The Swiss Supreme Court furthermore stressed that the carve-outs from the Convention's applicability listed in article 2 CISG are exhaustive. Accordingly, the Convention also applies to sales contracts initiated by way of a public tender (because these are not covered by article 2(b) CISG) as well as to sales contracts involving State-owned entities or entities acting as buyers/sellers in exercise of a public function (because these cannot be equated to the constellations covered by article 2(c) CISG). Where the Convention applies, it implicitly also governs the burden of proof in accordance with the principle *actori incumbit probatio*.

The Supreme Court then extensively discussed the prerequisites for an exclusion of the Convention's application by the parties (article 6 CISG). It confirmed that the contractual choice of the law of a CISG Contracting State (as e.g. "Swiss law") does generally not amount to an exclusion of the CISG. This can only be different in presence of "clear and unambiguous" indications that both parties intended to exclude the Convention. The burden of proof lies with the party relying on an exclusion. The fact that the buyer's general conditions of purchase in the present case used a number of legal terms not found in the CISG was held to be insufficient in this regard. The Supreme Court then discussed whether it could amount to an implicit exclusion of the Convention that both parties had based their legal arguments in the Court of First Instance exclusively on Swiss domestic law. The Supreme Court stressed that the evidentiary standard for an intent to exclude is the same at the contractual and at the post-contractual stage, resulting in an equally high threshold applying to exclusions during court proceedings. Accordingly, restraint should be exercised before deducting an intent to exclude from a party's mere reference to a domestic law (usually the *lex fori*), which can only indicate such an intent if there is proof that both parties were positively aware of the CISG's applicability and nevertheless had reached an agreement to exclude its application. In the present case, the Supreme Court found that no exclusion of the Convention in accordance with article 6 CISG had been made.

Regarding a CISG buyer's right to rely on domestic law provisions that allow a contract to be rescinded if the buyer's intent was affected by an error (mistake) during contract formation, the Swiss Supreme Court affirmed the Court of Appeal's position that no such reliance is admissible whenever the buyer's error related to the quality of the goods. The Supreme Court held that, in such a case, domestic law rules about error (mistake) are pre-empted by articles 35 et seq. CISG, because these CISG provisions together with the CISG provisions on buyers' remedies provide an exhaustive regulation of the issue. If recourse to domestic law was allowed, the Convention's inherent limitations to the buyer's rights – as, inter alia, the notice requirement and cut-off period under article 39 CISG, as well as the "fundamental breach" threshold under article 49(1)(a) CISG – could be circumvented, thus threatening the international uniformity of the Convention's application. Citing article 7(1) CISG, the Swiss Supreme Court thereby adopted an interpretation under the CISG that decisively differs from the prevailing position under Swiss domestic law, where the Supreme Court is traditionally allowing buyers to rely on provisions about error (mistake) in such cases. For the sake of clarification, the Supreme Court

pointed out that the Convention's pre-emptive effect is limited to errors that relate to issues governed by the Convention (as notably the quality of the goods sold), but does not extend to errors relating to other issues such as the contracting partner's identity.

Case 1981: CISG 1; 3; 4; 7; 19; 21; 25; 29; 77
Spain: Ad hoc arbitration
Seller A v. Buyer B
17 December 2019
Original in Spanish

Available at: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas

The dispute involved a party from a country A (seller) engaged in the design, manufacture and commissioning of industrial plants and a party B (buyer) specializing in the provision of supplies for industrial plants. The parties entered into a contract entitled "Purchase order", whereby party A undertook to design, manufacture, supply, inspect, test, package for dispatch by sea, prepare for transfer, transport and insure until delivery, under free carrier terms, at a port in A's country some of the equipment and materials that were to be installed at an industrial plant in a third country. Moreover, the contract established an obligation to provide or subcontract for the provision of, as appropriate, on-site training services and to carry out the assembly, installation, pre-commissioning, commissioning and start-up of the plant. The aforementioned contract derived from another contract entered into by party B and a third party (C), which was the main contractor for the works as a whole. There are many cross references between the contract subject to arbitration and the one concluded by parties B and C.

Each of the two parties in the arbitration proceedings moved for the other to be declared to be in breach of the contract – the buyer to be so declared owing to non-performance with regard to payment of part of the contract price and the interest payable by contract; the seller for having failed to comply with its contractual obligations, particularly as regards the delivery of part of the equipment and certain instances of non-conformity. The buyer admitted that it had not paid some invoices, though it considered itself to be entitled to compensation because of the seller's failures to perform.

Among the various issues discussed, the legal nature of the contract may be singled out, since party A contended that it was a sales contract governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), whereas party B argued that the national laws of its country were applicable and that the contract should be regarded as a turnkey contract, specifically as a subtype of the latter, namely a works contract falling under national law. Party B thus equated the type of contract that it had entered into with party A to its contract with C.

The Convention's applicability to the case in question was considered in the award, which made reference to numerous principles, such as the principles of internationality, uniformity and good faith (article 7(1)), citing legal opinions and case law to that effect. The award held that the criteria for applicability laid down in the Convention (article 1(1)(a)) had been met and that the Convention was directly applicable, since at the time the contract was concluded the Convention had been ratified by the countries of both buyer and seller (article 3). The analysed contract was a sales contract (article 3(1)) that had included certain services (article 3(2)) which did not constitute the preponderant part of the seller's obligations. However, that did not mean as such that any of the criteria for exclusion from the scope of the Convention specified in article 2 had been met.

Of particular relevance was the holistic approach taken in considering the contract and the Convention's applicability on the basis of article 3 and with reference to CISG Advisory Council Opinion No. 4. A central element of the discussion on the legal nature of the contract had to do with the extent of the obligations assumed under the

contract and, in particular, whether the seller was under the obligation to provide and carry out supervision, training, assembly, installation, preparatory work, commissioning and start-up of the equipment.

Drawing on CISG Advisory Council Opinion No. 4 in relation to both article 3(1) and article 3(2) of the Convention, the arbitrator considered the Convention's applicability. The Convention allows for mixed contracts combining sales and the supply of services to be included within its scope of application; specifically, it is provided that, where the services are not the preponderant part of the contract, the Convention applies to the contract as a whole. Therefore, the services that were logically an ancillary as opposed to preponderant part of the contract subject to arbitration fall under the broad concept of a sales contract envisaged by the Convention. Moreover, the clause in the contract dealing with installation and commissioning did not lay down any price (in contrast to the contract between B and C), but, rather, left that to be decided in subsequent negotiations as a matter to be covered by a subcontract for those services.

The sole arbitrator regarded the following other principles to be applicable as well:

(a) The principle of good faith in the interpretation of a contract (article 7(1) of the Convention);

(b) Estoppel, that is, the principle whereby a person is precluded from *venire contra factum propium* (article 29 of the Convention);

(c) The principle of "avoidance of business disruption and economic waste" (articles 25 and 77 of the Convention), as formulated in CISG Advisory Council Opinion No. 9, paragraphs 3.11 and 3.23;

(d) The principle of preservation of the agreement (articles 19(2) and 21(2) of the Convention);

(e) The principle of *favor executionis*;

(f) The principle of full compensation (CISG Advisory Council Opinion No. 6, paragraph 1);

(g) The obligation or principle of mitigation laid down in article 77 of the Convention (CISG Advisory Council Opinion No. 6, paragraph 1.1).

With regard to proof of loss, the sole arbitrator also invoked the principles of reasonableness and proportionality, and further referred to the principle of "certainty of harm", whereby it must be possible to prove with reasonable certainty that a loss was sustained. If the amount of damages cannot be established with a sufficient degree of certainty, it is at the discretion of the court to set the level of compensation, in line with article 7.4.3 of the Unidroit Principles of International Commercial Contracts (2016 edition).

Case 1982: CISG 1(1)(a); 25; 35(2)(b); 49(1)(a); 75; 81
People's Republic of China: Shenzhen Court of International Arbitration
Case No. SHEN C2012072
Chinese party v. Italian party
27 December 2013
Original in Chinese
Not published

Abstract prepared by Yin HE, Wei MENG and Yonglin PAN

This case deals primarily with the determination of non-conformity of the delivered goods and the resulting intention of the parties to terminate the contract and claim damages.

On 26 January 2010, a Chinese buyer entered into a "Purchase Contract" and a "Technical Agreement" with an Italian seller for the purchase of equipment for the manufacturing of outer casing for washing machines (hereinafter "equipment" or

"goods") which needed to be customized as to the body materials according to the contract and drawings of components. The contract provided for Chinese law as the applicable law. After the conclusion of the contract, the buyer made a payment to the seller and sent the body materials and the drawings. The seller delivered equipment that did not pass the inspection and could not be properly installed.

The buyer initiated arbitral proceedings in Shenzhen Court of International Arbitration (formerly known as CIETAC South China Sub-Commission) for termination of the sales contract, restitution of the payment made and payment of damages on the grounds of the non-conformity of the goods which was discovered after their handover.

The arbitral tribunal noted that the CISG should be applicable to the disputed sales contract, the contract should be officially terminated from the date of the award, and the seller should return 70 per cent of the purchase price to the buyer.

Regarding the issue of applicable law, the arbitral tribunal noted that article 1(1)(a) CISG applied since : (1) The parties have entered into a sales contract; (2) Business places of parties are in different countries; (3) Both countries are Contracting States to the CISG. In the case at hand, the buyer is a company with place of business in China, and the seller is a company with place of business in Italy. Both China and Italy are Contracting States to the CISG. The arbitral tribunal determined that, although the parties to the "Purchase Contract" agreed that Chinese law would be the applicable law, the CISG shall prevail pursuant to Chinese foreign-related civil laws and regulations.

Regarding the issue of the quality of the equipment, the arbitral tribunal indicated that article 35(2)(b) CISG requires that products shall be fit for its particular purpose. In this case, the seller accepted the drawings provided by the buyer, committed to manufacture specific goods (equipment for the manufacturing of outer casing for washing machines) needed by the buyer, but failed to manufacture goods fit for their purpose and failed in its commitment to adjust and repair the equipment in the final test. The seller had drawn attention on the non-conformity of the materials and components provided by the buyer after the pre-acceptance, but did not give the buyer a clear and timely feedback on the situation.

Since the parties did not reach an agreement on how to solve the issue, and the seller did not organize a third-party inspection to prove the non-conformity, the arbitral tribunal concluded that there was serious negligence on the part of the seller which was not in line with the prevailing practice in international trade. The arbitral tribunal further reasoned that the buyer should assume part of the responsibility. First, the buyer did not deliver the contractually agreed quantities of materials and components. This fact was not contested by the buyer. Moreover, the buyer had discovered, at the pre-acceptance stage, that the goods delivered were unfit for their purpose, but still requested the seller to expedite the consignment with no pre-acceptance report established. The arbitral tribunal therefore held that with respect to the non-conformity of the goods, the seller should bear 70 per cent of the liability and the buyer should bear 30 per cent.

Regarding the issue of contract termination, the arbitral tribunal, recalling article 25 CISG, noted that in the case at hand, when the goods were received at the buyer's factory, the buyer tried twice to adjust them and gave notice that they were unfit for their purpose, and that at that moment the buyer was entitled to declare the contract avoided as per article 49(1)(a) CISG. Referring to article 81(2) CISG and its assessment as to each party's liability, the arbitral tribunal held that 70 per cent of the amount paid to the seller should be returned to the buyer, plus interest, and that the buyer should return the goods to the seller concurrently.

Regarding the issue of compensation for damages, the buyer argued that due to the poor quality of the equipment, it had to purchase alternative equipment from other sellers and thus claimed for compensation for its corresponding losses under article 75 CISG. The arbitral tribunal noted that the buyer failed to prove how many

washing machine outer casings could be produced and their value if the equipment had been of sufficient quality, nor did it prove that the replacing equipment purchased from another seller were the same as the equipment described in the disputed contract. As the evidence the buyer provided were insufficient and inadequate, the arbitral tribunal dismissed the claim for damages.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 1983: MLEC 5; 7; 8, 9(2), 10; MLES 2(a)
Colombia: Seventh Civil Court of the Oral Proceedings Circuit of Medellín
Decision No. 624
Banco Caja Social S.A. v. Gloria Aleida Herrera Arango and Carlos Andrés Ochoa Londoño
8 July 2020
Original in Spanish
Available at: www.ramajudicial.gov.co

Abstract prepared by Adriana Castro Pinzón

This case involved ruling on the admissibility of a dematerialized security (promissory note) in the context of an enforced collection procedure. To be enforceable, an electronic promissory note must have been authenticated by the debtor using a digital signature.

The claimant appealed the decision rejecting its application for an order for payment to be issued on the basis of a dematerialized promissory note. The rejection was based on the assessment that the document submitted was a copy and that the requirement laid down in substantive law and the Code of Civil Procedure whereby a document must be presented in its original form if it is to be treated as a security and considered enforceable had therefore not been fulfilled. The electronic document submitted was a certificate of deposit for the custody and management of securities issued by the Central Securities Depository of Colombia (DECEVAL) that was signed electronically using an authenticated digital signature. Invoking the criterion of functional equivalence (see articles 5, 6, 7, 8, 9 and 10 of the UNCITRAL Model Law on Electronic Commerce) and the substantive rules of the Commercial Code, the appellant asked for the dematerialized promissory note to be recognized as fulfilling the relevant requirements and, consequently, as enforceable for the purposes of debt recovery.

The considerations of the judge hearing the appeal focused on whether the requirement that the promissory note be signed by the debtors had been fulfilled. In his reasoning, he argued that the requirement of submission in the original form did not need to be met in the case of an electronic security, since the national legislature had adapted the legal system to a digital environment (articles 5 and 9(2) of the Model Law on Electronic Commerce). However, he noted that, although the document submitted had been digitally signed by the entity which issued the certificate, it did not reflect the (electronic) signature of the debtors.

The judge hearing the appeal argued that, since the certificate was a data message, the signature could not be autographic or a mechanical reproduction thereof, but, rather, it had to be electronic like the financial instrument itself that was being signed. He noted that under the Colombian legal framework an electronic signature constituted a method for authenticating a message that was reliable and appropriate for the purpose for which the message had been generated or communicated (article 7 of the Model Law on Electronic Commerce; article 2(a) of the UNCITRAL Model Law on Electronic Signatures). He also acknowledged that, owing to the continuous flow of a large number of securities on the securities market, it had become necessary to find an expeditious and secure mechanism so as to ensure that the whole system was agile and efficient. To that end, central securities depositories had been created. It was worth noting that a security ceased to be in circulation as soon as it was deposited with an entity authorized to hold such deposits, and that the security was

dematerialized by means of a computerized book-entry system that made it possible to detail the holders of the various securities and how many securities were owned by each.

In analysing the case in question, the judge observed that signatures seemingly belonging to the debtors appeared above each of their names on the promissory note – as copies, rather than original signatures. He argued that, for a signature incorporated into an electronic security to have full legal effect, it must meet the requirements of a digital signature. The certificate issued by DECEVAL had been submitted as part of the proceedings, but no documents serving to authenticate the debtors' digital signatures had been provided. The judge upheld the decision rejecting the application for an order for payment, albeit on the basis of different arguments.

Case 1984 MLEC 6(1); 7(1)
South Africa: Supreme Court of Appeal
Case No: 71/2019
Global & Local Investments Advisors (Pty) Ltd. v. Fouche
18 March 2020
Original in English
Published: (71/2019) [2019] ZASCA 08 (18 March 2020)
Available at http://www.saflii.org/za/cases/ZASCA/2020/8.html

Abstract prepared by Sieg Eiselen

The case deals with the question whether a name typed at the end of an email constituted a signature as contemplated by the parties in their underlying agreement on appeal from the Gauteng High Court (Votrster AJ) and as provided for in section 13(3) of the Electronic Communications and Transactions Act 25 of 2002. Section 12 (writing) and section 13(3) are based on articles 6(1) and 7(1) MLEC. That court found that there had been a breach of the mandate and that consequently the appellant was liable to be reimbursed in the amount of R804 000 because the emails in question did not satisfy the signature requirement in the particular circumstances.

Fouche gave a written mandate to Global to act as his agent and invest money with Investec bank on his behalf. The mandate stipulated that "all instructions must be sent by fax to [xxxx] or by email to [xxxx] with client's signature." Global opened the account and managed the fund for a monthly fee.

In August 2016 fraudsters hacked into Fouche's account and sent three emails on 15, 18 and 24 August 2016 instructing Global to make payments into named third party accounts with FNB. The emails ended with the words "Regards, Nick" and "Thanks, Nick". The emails on appearance emanated from Fouche's email account and looked genuine.

In response, Global paid out a total of R804 000 from Fouche's account. When Fouche became aware of the payments, he informed Global that he had not sent the emails and he claimed payment of the amounts that had been transferred.

Global's main defence was that the instruction was sent from Fouche's email address and that the type-written name at the bottom of each email satisfied the signature requirement of the agreement in accordance with the section 13 of the Electronic Communications and Transactions Act ("ECTA"). The court of first instance held that there was no valid signature and that Global was accordingly liable to Fouche.

On appeal the court focused on a proper interpretation of the written mandate and whether Global acted in breach thereof. In construing the mandate, the context must be considered. In the commercial and legal world signatures serve established purposes. Signatures are used as a basis to determine authority and can be checked for authenticity.

To sign a document means to authenticate that which stands for or is intended to represent the name of the person who is to authenticate. The court held that the contention that the Gmail dispatching address of Mr Fouche together with his name

at the end of the email served an authentication purpose appears contrived. This is especially so since the mandate requires a "signature" which in every day and commercial context serves an authentication and verification purpose.

According to the court, the court below cannot be faulted for concluding that what was required was a signature in the ordinary course, namely in manuscript form, even if transmitted electronically, for purposes of authentication and verification. There was no provision in the agreement for an electronic signature.

Global placed reliance on *Spring Forest Trading 599 CC v. Wilberry (Pty) Ltd. t/a Ecowash and Another* 2015 (2) SA 118 (SCA).[4] The dispute between the parties in that case was whether the names of the parties at the bottom or foot of each email constituted signatures for the required consensual cancellation of the agreement.

The court held that *Spring Forest* is distinguishable for the following reasons: The authority of the persons who had written and sent the emails was not an issue in that case as it was in this case. The issue in that case was whether an exchange of emails between the contracting parties could satisfy the requirement imposed by them in the contract that "consensual cancellation" of their contract be "in writing and signed" by the parties.

In the present case the emails in issue were in fact fraudulent. They were not written nor sent by the person they purported to originate from. They are fraudulent as they were written and dispatched by a person or persons without the authority to do so.

Reliance on a typed name as a "signature" where required in terms of an agreement or mandate should be treated with circumspection. Even a typed attachment with an apparently "wet" signature, as the court suggests, should be treated with circumspection as such signatures can easily be copied and pasted from other documents.

[4] CLOUT case No. 1602.